In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-267

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBERT SCRIVENER, d/b/a AA ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent's brief in opposition erroneously states the factual setting in which this case arose. Its version of the facts (Br. pp. 2-6, 11-14, 30) repeatedly ignores credited evidence and relies on testimony discredited by the Trial Examiner and the Board.[1] Thus, the testimony credited by the Trial

[1] There is no evidence to support respondent's claim (Br. pp. 4-5, 31) that the Section 8(a)(4) allegations against it were "trumped-up" by a Board agent, who assertedly interviewed the dischargees because he hoped to "lay a foundation" for a charge that respondent had violated that section.

Examiner established that President Scrivener knew of the employees' meeting with the Board field examiner, and initiated a discussion of that matter, before he discharged them (Pet. App. D, pp. 51-53; A. 74, 91). The Board accepted this credibility resolution, concluding that, "[a]s found by the Trial Examiner and established by the record," respondent discharged four employees "in retaliation against them for having met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against Respondent" (Pet. App. D, pp. 20-21).

2. Respondent contends that its retaliatory discharge of these four employees did not violate Section 8(a)(1) and (4) of the Act because the Act protects only employee "testimony", *i.e.*, "oral evidence presented in a formal Board proceeding where all parties are present, have an opportunity to cross-examine and present their own testimony" (Br. p. 19). In support of this contention, respondent argues that "[i]t would be absurd to construe Section 8(a)(4) as forbidding an employer from discriminating against an employee for making statements to an NLRB investigator in informal pre-complaint investigation," since the employer ordinarily would not know what an employee might have told the investigator and would have no reason to discharge the employee for statements that might well be favorable to the employer (Br. pp. 24-26).

This argument misconceives the fundamental policy underlying Section 8(a)(4). Congress intended

this provision to assure that an employee would "be *completely free* from coercion against reporting [information about unfair labor practices] to the Board." *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238 (emphasis supplied). There was concern with more than merely protecting employees against employer reprisals for having given testimony unfavorable to the employer; the basic objective was to keep free and unimpeded the channels of communication between employees and the Board and to dispel any fear on the part of employees that they risked reprisals by employers by cooperating with the Board in the investigation and trial of unfair labor practice charges, irrespective of the nature of the information they gave to the Board. The investigation by the Board is as important to the unfair labor practice proceeding as is the filing of a charge or the formal hearing. The legislative purpose requires that Section 8(a)(4) be construed to protect an employee who participates in the investigative process.

3. Nor is there substance to respondent's contention (Br. p. 15) that the Board failed to find that the discharges of the employees for participation in the Board's investigation also violated Section 8(a)(1) of the Act. The Board specifically found that "Respondent's conduct falls within the prohibitions of Section 8(a)(1) and (4) of the Act" (Pet. App. D, p. 21). The dismissal of the complaint pertained

only to allegations of "independent and unrelated violations of Section 8(a)(1), (3), and (5) of the Act" (Pet. App. D, p. 23).

Respectfully submitted.

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General Counsel,
National Labor Relations Board.

SEPTEMBER 1971.

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